

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Daniel D. Smith)	File No.: EB-10-KC-0021
)	
Licensee of Station KANR)	NAL/Acct. No. 201132560001
Belle Plaine, Kansas)	
Facility ID #15410)	FRN: 0002288728
Owner of Antenna Structure #1033278)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 8, 2010

Released: November 10, 2010

By the District Director, Kansas City Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Daniel D. Smith, licensee of station KANR and owner of antenna structure number 1033278 in Belle Plaine, Kansas, apparently willfully and repeatedly violated Sections 11.35(a), 17.47, 17.50, and 73.3526 of the Commission’s Rules (“Rules”)¹ by failing to: (1) maintain operational emergency alert system (“EAS”) equipment; (2) make an observation of antenna structure lighting at least once each 24-hour period; (3) repaint the antenna structure as necessary to maintain good visibility; and (4) maintain and make available a complete public inspection file. We conclude that Mr. Smith is apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000).

II. BACKGROUND

2. On March 31, 2010, agents from the Enforcement Bureau’s Kansas City Office (“Kansas City Office”) inspected the main studio of radio station KANR during regular business hours. The agents observed that the station’s EAS equipment was inoperable because the power cord was disconnected. Mr. Smith stated that the EAS equipment became inoperable sometime between the year 2000 and the year 2006 and had remained inoperable since then. Mr. Smith said that he tried to hire a contract engineer to fix the EAS but the engineer was too busy to conduct the repairs. Station KANR had no logs documenting when the last EAS test had been sent or when the EAS equipment became inoperable. Agents from the Kansas City Office also observed that the station’s public inspection file was missing quarterly issues/programs lists after the fourth quarter of 2008. Mr. Smith admitted that he had not placed any issues/programs lists in the public inspection file after the fourth quarter of 2008.

3. Also on March 31, 2010, the agents from the Kansas City Office inspected the station KANR tower bearing antenna structure registration number 1033278, which is registered to Mr. Smith. The agents observed that the paint on the tower was severely faded and areas of bare metal were showing. Mr. Smith stated that the tower was last painted before it was erected in 1996. In addition, the agents observed that all three flashing beacons on the structure were either non-lighted or non-flashing and several of the

¹ 47 C.F.R. §§ 11.35(a), 17.47, 17.50, 73.3526.

side lamps on the structure were inoperable.² Mr. Smith admitted that the station did not have any automated equipment to monitor the structure's lighting. He also admitted that no station personnel were monitoring visually the lighting on the structure every 24 hours as required by Section 17.47(a) of the Rules.³ Mr. Smith stated that he was aware that the side lamps were inoperable but was unaware of the non-flashing condition of the lights. He had no logs or records documenting his observations or any failures in the lights. He stated that he last observed the tower several days before the inspection.⁴

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended, ("Act"), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁵ The term "willful" as used in Section 503(b) of the Act has been interpreted to mean simply that the acts or omissions are committed knowingly.⁶ The term "repeated" means the commission or omission of such act more than once or for more than one day.⁷

5. Every broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to refrain from participation, and that request is approved by the Commission.⁸ The EAS enables the President and state and local governments to provide immediate and emergency communications and information to the general public.⁹ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.¹⁰ Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station. As the nation's emergency warning system, the Emergency Alert System is critical to public safety, and we recognize the vital role

² The Federal Aviation Administration ("FAA") issued a Notice to Airmen on March 31, 2010 regarding the antenna structure at Mr. Smith's request approximately two hours after the end of the inspection.

³ 47 C.F.R. § 17.47(a).

⁴ Mr. Smith observed the tower on March 29, 2010 during the daytime when the lights were not exhibited, so he was unable to assess whether the lights were operating properly. Mr. Smith said that he observed the exhibited lights on the tower before March 29, 2010, but he could not recall the precise day.

⁵ 47 U.S.C. § 503(b).

⁶ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act..." See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

⁷ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

⁸ 47 C.F.R. §§ 11.11, 11.41.

⁹ 47 C.F.R. §§ 11.1, 11.21.

¹⁰ 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

that broadcasters play in ensuring its success. The Commission takes seriously any violations of the Rules implementing the EAS and expects full compliance from its licensees.

6. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and attention signal generating and receiving equipment are installed and operational so that the monitoring and transmitting functions are available when the station is in operation.¹¹ On March 31, 2010, agents from the Kansas City Office observed that station KANR's installed EAS equipment was not operational when the station was in operation. Mr. Smith admitted that an operational EAS encoder/decoder unit had not been available since sometime between 2000 and 2006. Mr. Smith also admitted that there was no documentation of the exact date the unit became inoperative, and he was unable to produce any evidence that the EAS unit had ever been operational or that required EAS weekly or monthly tests had ever been sent. Thus, based on the evidence before us, we find that Mr. Smith apparently willfully and repeatedly violated Section 11.35(a) of the Rules by failing to maintain operational EAS equipment while the station was in operation from at least 2006 until March 31, 2010.

7. Section 17.47(a) of the Rules states that the owner of any antenna structure that is registered with the Commission and has been assigned lighting specifications "(1) [s]hall make an observation of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights, to insure that all such lights are functioning properly as required; or alternatively, (2) [s]hall provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner." Station KANR's antenna structure is 151 meters above ground in height and must be painted and lit.¹² At the time of inspection, all three flashing beacons on the structure were either not flashing or not lit and several side lamps were inoperable. Mr. Smith was aware of the inoperable side lamps but was unaware of the non-flashing or non-lit beacons. Mr. Smith stated that the last visual tower light observation by any station personnel was made several days prior to the inspection. The station maintains no operational automated monitoring equipment. Therefore, based on the evidence before us, we find that Mr. Smith apparently willfully and repeatedly violated Section 17.47 of the Rules by failing to make a visual observation of antenna structure lighting at least once each 24 hour period on March 29 and March 30, 2010.

8. Section 17.50 of the Rules states that "[a]ntenna structures requiring painting under this part shall be cleaned or repainted as often as necessary to maintain good visibility." At the time of inspection, the paint on antenna structure number 1033278 was severely faded with bare metal exposed in several areas on the tower. Due to the condition of the paint, the tower is no longer clearly visible. The paint was in such a condition that the deterioration had to have occurred over more than one day. Mr. Smith stated that the tower had not been painted since 1996, that he personally maintained the tower site, and that he was aware of the paint condition. Thus, based on the evidence before us, we find that Mr. Smith apparently willfully and repeatedly violated Section 17.50 of the Rules by failing to repaint the antenna structure as necessary to maintain good visibility.

9. Section 73.3526 of the Rules states that "[e]very permittee or licensee of an AM, FM, TV or a Class A station in the commercial broadcast services shall maintain a public inspection file containing the material" set forth in this section.¹³ The public inspection file must be maintained at the main studio of the station,¹⁴ and must be available for public inspection at any time during regular business

¹¹ 47 C.F.R. § 11.35(a).

¹² Antenna structures must be painted and lighted when they exceed 60.96 meters in height above ground. *See* 47 C.F.R. § 17.21.

¹³ 47 C.F.R. § 73.3526(a)(2).

¹⁴ 47 C.F.R. § 73.3526(b).

hours.¹⁵ Section 73.3526(e)(12) of the Rules requires commercial AM and FM broadcast stations to place a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period in the station's public inspection file. The issues/programs list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter. On March 31, 2010, during normal business hours, agents from the Kansas City Office requested to inspect station KANR's public inspection file at the station's main studio. The agents observed that the station's public inspection file was missing issues/programs list after the fourth quarter of 2008. Mr. Smith stated that no issues/programs lists had been filed since the fourth quarter of 2008. Therefore, based on the evidence before us, we find that Mr. Smith apparently willfully and repeatedly violated Section 73.3526(e)(12) of the Rules by failing to maintain all required issues/programs lists in the station's public inspection file and apparently willfully violated Section 73.3526 of the Rules by failing to make available a complete public inspection file.

10. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for: (1) failure to maintain operational EAS equipment is \$8,000; (2) failure to conduct required monitoring is \$2,000; (3) failure to repaint the antenna structure is \$10,000; and (4) violation of public file rules is \$10,000.¹⁶ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require.¹⁷ In this regard, we note that this licensee has a history of not maintaining operational EAS equipment at this station.¹⁸ Accordingly, we will upwardly adjust the forfeiture for failure to maintain operational EAS equipment to \$9,000. Because station KANR's public inspection file contained a portion of the items required, we find a downward adjustment of the base forfeiture for the public file violation to \$4,000 is warranted. Thus, applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Daniel Smith is apparently liable for a forfeiture in the amount of \$25,000. We direct Mr. Smith to submit a sworn statement within thirty days of release of this *NAL* describing the specific action(s) taken to correct each of the cited violations and preclude recurrence, and specifying when the corrective actions were taken. We caution Mr. Smith that future violations of our rules may subject him to more severe enforcement penalties.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's Rules, Daniel D. Smith is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for violations of Sections 11.35(a), 17.47, 17.50 and 73.3526 of the Rules.¹⁹

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules

¹⁵ 47 C.F.R. § 73.3526(c).

¹⁶ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁷ 47 U.S.C. § 503(b)(2)(E).

¹⁸ On April 16, 1997, the Commission issued a Notice of Violation ("NOV") to Mr. Smith for several violations found during an April 9, 1997 inspection of FM Broadcast station KANR, including failure to maintain operational EAS equipment in violation of Section 11.35(a) of the Rules. *Daniel D. Smith*, Notice of Violation (Compliance & Information Bureau, rel. April 16, 1997).

¹⁹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 11.35(a), 17.47, 17.50, 73.3526.

within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Daniel D. Smith **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. **IT IS FURTHER ORDERED** that, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Daniel D. Smith **SHALL SUBMIT** a sworn statement as described in paragraph 10 to the Kansas City Office listed below.

14. Payment of the forfeiture must be made by credit card, check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁸ If you have questions, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. Mr. Smith shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Kansas City Office, 520 N.E. Colbern Rd., 2nd Floor, Lees Summit, MO 64086 and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to SCR-Response@fcc.gov.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

⁸ See 47 C.F.R. § 1.1914.

17. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Daniel D. Smith at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Robert C. McKinney
District Director,
Kansas City Office
South Central Region
Enforcement Bureau